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Supreme Court of the United States

October Term, 1964
No. 616

THE CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District of the State of California.

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IN THE

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No. .....

THE CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District of the State of California.

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second Appellate District, entered in the above-entitled case on June 3, 1964.

Citations to Opinions Below.

The opinion of the District Court of Appeal below, printed as Appendix B hereto, is reported in 227 Adv. Cal. App. 669, and 38 Cal. Rptr. 923, under the name of *Union Oil Company of California v. The City of Los Angeles.*

Jurisdiction.

The judgment of the District Court of Appeal was entered on June 3, 1964 [R. Opinion]; Rehearing was denied on June 23, 1964 [R. Order of June 3]; and a Petition for Hearing was denied by the Supreme Court of the State of California on July 29, 1964 [R. Order of July 29]. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3) since the validity of a state statute, to wit, provisions of the Business License Tax Ordinance of the City of Los Angeles, is drawn in question.

Question Presented.

Is a city barred by the "export-import" clause of the United States Constitution from imposing upon a domestic seller (Union Oil Company of California) a business license tax which includes within its measure certain gross receipts resulting from sales of oil products to a domestic purchaser (The United States Government) where the purchaser takes delivery within the city and at all times retains not only ownership of the oil purchased but dominion over it until it is completely consumed in overseas operations, including the operation of military aircraft and military vehicles?

How Federal Question Is Presented.

The action below was for a refund of City Business license taxes. The claim for the refund of taxes filed by Union Oil Company of California [R. Clk. Tr. p. 10] stated as its ground in part as follows:

> "Claimant asserts that the imposition of said tax under Sections 21.166 and 21.167 of the said ordinance [Los Angeles Municipal Code] is wholly invalid for the reasons and on the grounds that

said Sections 21.166 and 21.167 of the Ordinance do not, can not, and are not intended to apply to that portion of Claimant's gross receipts from the said sales for export of petroleum products. Further to the extent that the said Ordinance has been construed by the City to apply to said gross receipts, then the said Ordinance, as so construed is invalid under the Constitution of the United States, under the Constitution of the State of California, under the general laws of the State of California, under the Charter of the City of Los Angeles, and under the common law."

The claim so stated was incorporated into the First Amended and Supplemental Complaint [R. Clk. Tr. p. 4]; the question whether the sales so described were in fact sales for export within the meaning of Article I, Sec. 10, Clause 2 of the United States Constitution was argued in the trial court, the District Court of Appeal and in the Petition for Hearing before the Supreme Court of California.

The decision of the District Court of Appeal is expressly and solely based upon the holding that the oil in question was sold for export within the meaning of Article I, Sec. 10, Clause 2, as shown by the following two paragraphs of the Opinion:

> "The sole issue presented on this appeal is whether the tax imposed by the City, under the stipulated facts, is an impost or duty on an export as that term is used in the Constitution." [R. Opinion p. 7.]
>
> "In this case the contract for sale of the oil contemplated its export to foreign lands and it was delivered to such lands." [R. Opinion p. 10.]

Statute Involved.

The statutory provisions involved are Section 21.02, 21.03, and 21.167 of the Los Angeles Municipal Code. They are printed in Appendix A in the form in which they existed at the time of the payments in question.

Statement.

The Business License Tax Ordinance of the City of Los Angeles imposes a tax for the privilege of engaging in business within the City of Los Angeles. Section 21.167 of that Ordinance (Appendix A) provides for the imposition of the tax upon that class of persons who are engaged within the City in the business of selling goods, wares and merchandise at retail at the rate of $0.50 per $1,000 of gross receipts. The Union Oil Company of California, under protest, paid taxes measured by gross receipts from retail sales of oil products delivered within the City of Los Angeles to the United States Government under the following agreed facts:

> "(a) All such products sold were delivered to the purchaser, the United States Government, either by pumping said products aboard a merchant ship or by delivering said products to a port of embarkation for transhipment either by merchant ships or United States Government vessels.
>
> "(b) All of said products were transported to places outside the continental limits of the United States excluding territories of the United States.
>
> "(c) All of the products sold to the United States were consumed by it in its overseas opera-

tions, including the operation of military aircraft and military vehicles." [R. Clk. Tr. p. 22.]

The protest accompanying the payment of taxes made by the Union Oil Company of California was based upon several grounds, including a challenge to the authority of the City to impose taxes with respect to such sales by reason of the provisions of Article I, Sec. 10, Clause 2 of the United States Constitution.

The form in which the issue was raised in the trial court is contained in the following excerpt from paragraph 10 of the First Amended and Supplemental Complaint [R. Clk. Tr. p. 5]:

> "Plaintiff alleges that the imposition of said taxes and interest thereon in the total amount of $17,526.96 is wholly invalid on the grounds that said Sections 21.166 and 21.167 of the Los Angeles Municipal Code do not, cannot and are not intended to apply to plaintiff's gross receipts from the said export sales of refined petroleum products described and referred to in Paragraphs IV, VII and VIII hereinabove."

The trial court gave judgment to Union Oil Company. The District Court of Appeal affirmed that judgment. The question of whether the tax, as imposed by the City, was in fact a tax upon exports in violation of Article I, Sec. 10, Clause 2 of the Constitution of the United States was considered by the District Court of Appeal to be the sole issue presented on the appeal [R. Opinion, p. 7], and the decision was that the tax was forbidden. [R. Opinion p. 10.] The decision was unanimous.

Reasons for Granting the Writ.

A. The Problem Restated.

Briefly restated, The question presented here is whether a domestic seller is protected from local taxation by reason of Article I, Sec. 10, Clause 2 of the United States Constitution, under the following facts:

1. The seller, a domestic entity, delivers the product to a domestic buyer within the City of Los Angeles.

2. The seller knows that the buyer will transport the product out of the country and further knows that the buyer will entirely consume the product outside the country.

3. The buyer does in fact transport the product purchased out of the country, retains title to it at all times, and does in fact consume it outside the country.

It happens that the domestic purchaser in this case is the United States Government, and that the products purchased are petroleum products which were exclusively used in the overseas operations of the Government, including the operation of military vehicles and aircraft. These special considerations serve to sharpen the focus on the issue here presented, but the basic situation is not unique to government purchases: it is also present with respect to sales of consumable articles (tobacco, cosmetics, clothing, motor fuel, etc.) to any public or private purchaser who announces to a seller that the purchaser is about to transport the consumables abroad in the course of an official, pleasure, or business trip.

The question thus presented has apparently never before been considered in a reported decision. It involves a federal question of substance not previously

determined by this Court, and has been decided in a way that probably is not in accord with applicable decisions of this Court, as will be more particularly set out below.

B. The State Court Opinion Goes Beyond the Holding in Hostetter v. Idlewild Bon Voyage Liquor Corporation.

The closest reported factual situation to that presented herein is the case of *Hostetter v. Idlewild Bon Voyage Liquor Corporation,* .... U. S. ...., 84 S. Ct. 1293, decided June 1, 1964.

This Court then determined that a domestic seller was protected from local imposts with respect to transactions where the seller arranged to deliver consumable merchandise (liquor) to its customers at an out-of-country destination. The California District Court of Appeal in its Union Oil Company opinion has in effect determined that it was unnecessary for the New York seller to arrange for the overseas delivery, for the protection of the import-export clause attaches *even if the domestic purchaser-consumer takes delivery of merchandise within the United States and personally arranges for its overseas transportation.*

While recognizing that cases arising under the commerce clause are not necessarily appropriate authority in dealing with an import-export case, it is nevertheless of some assistance to use such authorities where, for lack of any reported cases, there are no other analogies. Applying commerce clause cases, it is apparent that the facts of *Hostetter v. Idlewild Bon Voyage Corp., supra,* are similar to *Standard Oil Co. v. Johnson,* 24 Cal. 2d 40, 147 P. 2d 583, since in both

cases the vendor undertook to deliver goods to the purchaser at a point outside the regulating jurisdiction. The local power to regulate was struck down in both cases. On the other hand, the facts of the within Union Oil Case, where the seller delivered to the buyer within the jurisdiction, and the buyer transported it away, are similar to *Department of the Treasury of Indiana v. Wood Preserving Corp.*, 313 U. S. 62, and *Indiana Department of Revenue v. Bendix Aviation Corp.*, 237 Ind. 98, 143 N. E. 2d 91 (Appeal Dismissed, 355 U. S. 607), in both of which the right of the local government to impose its tax was upheld.

The Union Oil Company decision, it thus appears, is a holding in a field not yet passed upon by this Court which clearly extends the protection of the import-export clause beyond any application found in previous cases presenting analogous facts.

C. The Concept of "Exportation" Has Always in the Past Included the Element of Goods Passing Into the Control of a Foreign Country.

The most commonly used definition of "export" is that set forth in *Swan & Finch v. United States*, 190 U. S. 143, 145, as follows:

> "As the legal notion of emigration is a going abroad with an intention of not returning, so that of exportation is a severance of the goods from the mass of things belonging to this country *with the intention of uniting them to the mass of things belonging to some foreign country or other.*" (Emphasis added.)

Substantially the same definition is used in *Matson Navigation Co. v. State Board of Equalization*, 136 Cal. App. 2d 577, 583.

A somewhat refined version of the same definition has been adopted by the Secretary of the Treasury (26 C. F. R., Part 40 (Rev. 1961), Appendix to subchapter D, page 347, Sec. 314.1) as follows:

> "(d) The term 'exportation' means the severance of an article from the mass of things belonging within the United States and the landing thereof in a foreign country for the purpose of uniting it with the mass of things belonging within such foreign country. . . ."

It is also clear from the authorities that when the definition speaks of "uniting" the goods to the mass of things belonging in a foreign country, it means something more than mere landing them in the foreign land. There must be a landing of the goods *with intent to unite them with the goods of the country.* There must be a change of dominion, a change of sovereignty, with respect to the goods in question. Thus, in *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 83:

> ". . . But when the oil was pumped into the hold of the vessel, *it passed into the control of a foreign purchaser.*" (Emphasis added.)

In *Matson Navigation Co. v. State Board of Equalization, supra,* following the quotation from *Swan & Finch,* the analysis is refined in a way most significant to the present case, but totally overlooked by the District Court of Appeal. The facts showed that the steamship Matsonia was sold to a corporation native to Panama. The sale was completed in California, both parties knowing that the ship was destined for Italy. The following appears at page 583 of 136 Cal. App. 2d:

> ". . . For all practical purposes the same acts both in the Richfield Oil case and in the present case *extinguished United States dominion over the subject matter of the sale and at the same time vested it in a foreign power.*" (Emphasis added.)

From the facts in the present case it is known that no foreign power was ever vested with any interest, either of title, possession or dominion, over the oil products purchased by the United States from Union Oil Company.

Typical treaty provisions existing between the United States, Japan and the Republic of the Philippines were cited to the California court as illustrating that the United States retained right, power, and authority within its foreign military facilities. See, for example, Administrative Agreement with Japan, 3 U. S. T. 3341, particularly Article III (p. 3343) and Article XI (p. 3347); Status of United Nations Forces Treaty, 5 U. S. T. 1123, particularly Article XIII (pp. 1131-1132); Agreement Between United States of America and the Republic of the Philippines, 61 Stat. 4019, particularly Article I (p. 4022), Article III (p. 4021) and Article V (p. 4022).

In the absence of any indication that the oil products sold to and consumed by the United States Government ever became the property of a foreign purchaser, or ever became united with the mass of things belonging in a foreign country, it is submitted that no exportation has occurred within the meaning of the export-import clause.

D. The Term "Exportation" Has Always Been Interpreted as Requiring the Presence of "Commerce", and of "Foreign Commerce" in Particular.

The earliest source materials available for determining the meaning of "export" as the term is used in Article I, Sec. 10, Clause 2, all indicate that it was to be taken in context of commerce. The debates of the Constitutional Convention illustrate this. See Madison's notes in Documents Illustrative of the Formation of the Union (Government Printing Office, 1927), as follows:

Tuesday, August 28, 1787—pp. 629-631
Thursday, August 16, 1787—pp. 552-555
Tuesday, August 21, 1787—pp. 584-588
Wednesday, September 12, Thursday, September 13, 1787—pp. 716-719.

In the Federalist Papers, Numbers 42 and 44 (Madison), the term "export" is used in a context of commerce.

Moreover, both early and late cases hold that for there to be an export *foreign commerce* must be present. Thus, in *Woodruff v. Parham,* 8 Wall. (75 U. S.) 123, 136:

> "It is not too much to say that, so far as our research has extended, neither the word 'export', 'import,' or 'impost' is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant."

The fact that "foreign commerce" is not only *meant*, but *essential*, is shown by the following from *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, 78:

> "The *requirement* that foreign commerce be involved (Woodruff v. Parham, 8 Wall. (U.S.) 123, 136, 19 L ed 382, 386) is met, for concededly the oil was sold for shipment abroad." (Emphasis added.)

It cannot be argued that the mere transportation of the oil from Los Angeles to the place of consumption was "commerce" within the meaning of the export-import clause, for while such transportation may be *traffic*, it is not *intercourse* when the goods are and remain at all times in the hands of the consumer and are merely carried to the point of consumption. Thus, in *Gibbons v. Ogden*, 9 Wheat. 1, 189:

> "Commerce, undoubtedly, is traffic but it is something more; it is intercourse. *It describes the commercial intercourse between nations*, and parts of nations, in all its branches. . . ." (Emphasis added.)

In view of the history of the export-import clause and its interpretation by the courts, it is submitted that the California court's opinion indicating that there may nevertheless be an exportation even though there is no foreign commerce is probably not in accord with applicable decisions of this Court.

E. The Consequences of the Union Oil Company Decision on State and Local Tax Administration Around the Country.

The decision in the Union Oil Company case stands for the proposition that the economic burden of a local excise tax cannot be imposed upon a buyer who announces to the vendor of a consumable item such as liquor, tobacco, fuel, or cosmetics, that he is about to leave the country and is taking the purchased item with him.

The decision does not require that the vendor send the item abroad, and claim exemption from the tax; the decision takes the view that the vendor is himself exporting when he sells to a domestic purchaser who represents (truthfully, to be sure) that he is taking the articles abroad for consumption.

In view of the great numbers of American citizens who travel abroad, and in view of the great reliance which state and local governments place upon sales, purchase and other taxes whose economic impact falls upon consumers, it is obvious that the field of state and local taxation will be seriously disturbed until it can be settled with finality as to whether the term "export" can be given the broad meaning given it in this case of apparent first impression.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX A.

"SEC. 21.02. *CONSTITUTIONAL EXEMPTIONS*

"Nothing in Article 1 or Article 1.5 of Chapter 2 of this Code shall be construed as requiring the payment of any tax for engaging in a business or the doing of an act when such payment would constitute an unlawful burden upon or an unlawful interference with interstate or foreign commerce, or which payment would be in violation of the Constitution of the United States or the Constitution of the State of California."

"SEC. 21.03. *IMPOSITION OF TAX.*

"Subject to the provisions of this Article, a license tax registration certificate must be obtained and a license tax must be paid by every person engaged in any of the businesses specified in Sections 21.50 to 21.198 of this Article; and a license tax is hereby imposed in the amount prescribed in the applicable section. No person shall engage in any business subject to tax under the provisions of this Article without obtaining a registration certificate and paying the tax required thereunder."

"SEC. 21.167. (a) Every person manufacturing and selling any goods, wares or merchandise at retail, or selling any goods, wares or merchandise at retail, and not otherwise specifically taxed by other provisions of this Article, shall pay for each calendar year or portion thereof the sum of $7.50 for the first $15,000 or less of gross receipts and, in addition thereto, the sum of 50 cents per year for each additional $1,000 of gross receipts or fractional part thereof in excess of $15,000; provided, however, that blind persons need not include the first $15,000 of gross receipts in the computation

of the amount of tax due hereunder nor be required to pay the minimum tax of $7.50. This exemption shall not subject such blind person to the provision of Sec. 21.190 of this Code.

"(b) For the purpose of this section, a retail sale or a sale at retail means a sale of goods, wares or merchandise for any purpose other than resale in the regular course of business.

"(c) Whenever a person engages at the same location in two or more businesses of the kind taxed in this section, a joint registration certificate snall be issued for all such businesses and the tax shall be measured by the sum of the gross receipts of all such businesses so conducted.

"(d) A blind person, within the meaning of this section shall mean a person having not more than ten per cent visual acuity in the better eye, with correction. Such blindness shall be certified by a licensed physician and surgeon who specializes in diseases of the eye, or by the Bureau of Vocational Rehabilitation of the Department of Education of the State of California, and the exemption provided by this section shall not apply until a certificate as to such blindness shall be furnished to the City Clerk."

APPENDIX B.

Opinion of the District Court of Appeal.

[Civ. No. 27502. Second Dist., Div. One. June 3, 1964.]

Union Oil Company of California, Plaintiff and Respondent v. City of Los Angeles, Defendant and Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Macklin Fleming, Judge. Affirmed.

Action to recover business license taxes collected by a city. Judgment for plaintiff affirmed.

Roger Arnebergh, City Attorney, Bourke Jones and James A. Doherty, Assistant City Attorneys, for Defendant and Appellant.

Hill, Farrer & Burrill, Carl A. Stutsman, Jr., Vincent C. Page and Jack R. White for Plaintiff and Respondent.

Fourt, J.—This is an appeal by defendant City of Los Angeles (hereinafter referred to as "City") from a judgment entered in favor of plaintiff Union Oil Company of California (hereinafter referred to as "Union") in an action for the recovery of business license taxes collected by City for the license years 1954 through 1958 inclusive.[1]

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[1]The judgment provides in pertinent part as follows: "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff have judgment against Defendant for the sum of $17,526.96, together with interest on said sum from September 11, 1958, in the sum of $5,472.26, and Plaintiff shall recover costs in the amount of $19.50."

The cause was submitted to the trial court on an agreed statement of facts. The facts are as follows:

"1. Plaintiff is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

"2. Defendant is now and at all times herein mentioned was a municipal corporation existing under and by virtue of the laws of the State of California being a chartered city located in the County of Los Angeles, State of California.

"3. At all times herein mentioned, Plaintiff was and now is engaged in the business of manufacturing and selling at wholesale and at retail petroleum products within and outside the City of Los Angeles.

"4. On the dates hereinbelow set forth, Plaintiff, in accordance with the applicable provisions of chapter II, article I, of the Los Angeles Municipal Code (sections 21.00 to 21.199, inclusive of Ordinance No. 77,000 as amended), and particularly under Sections 21.14, 21.166 and 21.167, filed with the Los Angeles City Clerk its written statements setting forth, among other things, the taxable gross receipts of Plaintiff from wholesale sales as defined in Section 21.166 and retail sales as defined in Section 21.167 and amounts of business license taxes due thereon for the license years and calendar years of receipts as follows:

Dates of Payment	License Years	Calendar Years of Receipts	Taxable Gross Receipts	Amounts of Taxes
Feb. 26, 1954	1954	1953	$73,724,391	$32,272.60
Feb. 28, 1955	1955	1954	77,703,045	34,291.50
Feb. 29, 1956	1956	1955	81,868,657	35,968.10
Feb. 28, 1957	1957	1956	77,431,554	33,674.40
Feb. 28, 1958	1958	1957	79,416,579	35,033.40

"5. On the same dates Plaintiff paid to the Los Angeles City Clerk the said amounts of license taxes due as hereinabove set forth.

"6. Said payments above set forth represent the amounts paid for places of business from which Plaintiff carried on within the City of Los Angeles business operations taxable under said sections.

"7. In preparing its said written statements showing its gross receipts from its wholesale and retail sales and in computing the amounts of business license taxes due on said gross receipts, for the license years 1954 through 1958, inclusive, *plaintiff did not include in its reported gross receipts the aggregate sum of $28,432,135.30 from the sale of petroleum products to the United States Government under the following conditions:*

"(a) *All such products sold were delivered to the purchaser, the United States Government either by pumping said products aboard a merchant ship or by delivering said products to a port of embarkation for transhipment either by merchant ships or United States Government vessels.*

"(b) *All of said products were transported to places outside the continental limits of the United States excluding territories of the United States.*

"(c) *All of the products sold to the United States Government were consumed by it in its overseas operations, including the operation of military aircraft and military vehicles.*

"8. Upon auditing Plaintiff's records for the license years 1954-1958, inclusive, Defendant's City Clerk adjusted the total amount of Plaintiff's gross receipts from its sales of petroleum products by including there-

in the said $28,432,135.30 of gross receipts from sales described in subparagraph 7 above and asserted deficiencies and interest against Plaintiff as follows:

License Year	Gross Receipts	License Tax	Interest	Total Tax Interest
1954	$11,077,581.55	$ 5,539.00	$1,523.23	$ 7,062.23
1955	15,121,887.47	7,561.00	1,625.62	9,186.62
1956	2,032,531.12	1,016.50	157.56	1,174.06
1957	452.00	0.50	0.50	0.55
1958	199,683.16	100.00	3.50	103.50
Totals:	$28,432,135.30	$14,217.00	$3,309.96	$17,526.96

"9. Thereafter, Defendant's City Clerk determined a net deficiency of Los Angeles Business License Tax payable by Plaintiff for the license years 1954-1958 in the total amount including interest of $17,526.96 all as set forth in paragraph 8 above. Said deficiency together with interest and penalties thereon was assessed to Plaintiff on or about August 22, 1958 by the said City Clerk by its notice of tax due No. 910873. On September 11, 1958 Plaintiff paid the total amount of said assessment, to wit $17,526.96, to the said City Clerk.

"10. Thereafter, and within the time prescribed by the appropriate sections of the Los Angeles City Charter and the Los Angeles Municipal Code, Plaintiff presented and filed with said City Clerk on or about June 23, 1960, a verified claim in writing for a refund of taxes including interest thereon in the amount of $17,526.96, and certain other taxes not involved herein, upon the form prescribed and furnished by Defendant. A copy of said claim for refund is attached hereto, made a part hereof and marked Exhibit A. Of the sum of $20,-217.41 which is the subject of said claim for refund, the amount of $17,526.96 is the subject of this action.

Plaintiff's claim to the extent of the amount and items herein involved has been rejected by the Defendant's City Counsel and City Clerk. No portion of said taxes, including interest thereon in the sum of $17,625.96 has been refunded or repaid to Plaintiff.

"11. Attached hereto, made a part hereof and marked Exhibit B are copies of a form of sales contract entered into with the United States for bulk petroleum products and Company documents illustrative of the delivery of products sold thereunder. Attached hereto, made a part herof and marked Exhibit C is a contract for the sale of products sold to the United States other than in bulk, and Company documents illustrative of the delivery procedures respecting products delivered thereunder." (Italics added.)

Findings of Fact and Conclusions of Law were waived. On January 2, 1963, the trial court filed its "Memorandum Opinion"[2] and judgment was entered February 27, 1963. The within appeal follows.

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[2]"The City of Los Angeles taxes wholesale and retail sellers for the privilege of doing business, the tax being measured by the amount of the seller's gross receipts. (Los Angeles Municipal Code §§ 21.166 and 21.167.) The City included in the measure of its business tax on Union Oil Company amounts received by Union Oil from its sale of petroleum products to the United States Government for shipment and use overseas.

"To the extent the tax was computed on such receipts it was a tax on exports, prohibited to the states and their instrumentalities by the United States Constitution. (Article I, Section 10, Clause 2.) Payment to Union Oil for these petroleum products was made after these products had been delivered to merchant ships or ports of embarkation for trans-shipment overseas, and hence after they had acquired the status of exports for the purpose of exemption from taxation. A tax on the sale of an article is a tax on the article itself. (*Brown v. Maryland*, 25 U.S. (12 Wheat), 419, 44 [6 L. Ed. 678, 687]; *A. G. Spaulding & Bros. v. Edwards*, 262 U. S. 66 [43 S. Ct. 485, 67 L. Ed. 865].) A business tax measured by export sales is deemed a tax on exports. (*Rich-*

The sole issue presented on this appeal is whether the tax imposed by the City, under the stipulated facts, is an impost or duty on an export as that term is used in the Constitution.[3]

City concedes in its opening brief that "if the factual distinction between the present matter and that involved in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 [678 Ct. 156, 91 L. Ed. 80], is without relevance, the judgment should be affirmed."

The factual difference which City asserts renders the *Richfield Oil* decision inapplicable is that in the *Rich-*

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field Oil Corp. v. State Board of Equalization, 329 U. S. 69 [67 S. Ct. 156, 91 L. Ed. 80]; *Gough Industries, Inc. v. State Board of Equalization*, 51 Cal. 2d 746 [336 P. 2d 161].)

"The term 'export' is not coterminous with the term 'commerce', and the limits of one cannot be read into the other, as the City Attorney has attempted to do. (*Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, 75, 76 [678 Ct. 156, 91 L. Ed. 80, 88, 89].) But even if export were to be considered constitutionally a subdivision of commerce, these sales would fall within the classification of commerce, both in its sense of movement (*Caminetti v. United States*, 242 U. S. 470 [37 S. Ct. 192, 61 L. Ed. 442]; *Powell v. United States Cartridge Co.*, 339 U. S. 497 [70 S. Ct. 755, 94 L. Ed 1017]) and in its sense of mercantile trade. [The United States Government in 1962 purchased $250 million of petroleum products from overseas suppliers for use overseas; patently the sales in this case were directly competitive with such overseas purchases.]

"That the buyer is the United States Government is immaterial; it, too, is entitled to the benefit of the prohibition against state taxation of imports and exports. (*Asiatic Petroleum Co. v. United States*, 78 Ct. Cl. 696.)"

[3]West's Annotated California Codes, United States Constitution, article I, section 10, clause 2, provides as follows: "No state shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

field Oil case the purchaser was a foreign government while in the case at bar, the purchaser is the United States government.[4]

City has presented no authority which requires that the nationality of the purchaser differ from that of the seller before the transaction can qualify as an export within the constitutional protection.

What was stated by Mr. Justice McComb in *Gough Industries v. State Board of Equalization*, 51 Cal. 2d 746, at page 749 [336 P. 2d 161], is helpful: "[2] From the foregoing authorities, [*i.e., Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (67 S. Ct. 156, 91 L. Ed. 80); *Maston Nav. Co. v. State Board of Equalization*, 136 Cal. App. 2d 577 (289 P. 2d 73); *A. G. Spaulding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865)] it appears that where an article is manufactured and sold in one of the states *for export to a foreign country*, it is free from state sales tax under the import-export clause of the United States Constitution *if at the time title passed the certainty of the foreign destination was plain.*" (Italics added.) (See *Eardley Fisheries Co. v. City of Seattle*, 50 Wn. 2d 566 [314 P. 2d 393].)

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[4]The following occurred, in part, during oral argument before this court when the City was presenting its opening argument:

"Q. By Mr. Justice Fourt: The nub of your argument is this, you cannot have a commercial transaction between an oil company and the federal government when they [i.e. federal government] use the oil abroad.

"A. By Mr. Doherty: When they use it solely for governmental purposes, yes.

"Q. By Mr. Justice Fourt: That is not a commercial transaction.

"A. By Mr. Doherty: The use by the government is not a commercial transaction . . . *we have got to have foreign commerce, there must be the dealings between persons under different sovereignties. . . .*" (Italics added.)

To state these transactions so formally conducted, of so obvious a character and so evidently in such complete good faith, were local sales in Los Angeles would be a purely arbitrary pronouncement.

This court has frequently made hairline distinctions to uphold a tax or interstate commerce and thereby prevent such commerce from escaping its fair proportion of the burden of taxation. No such difficulty presents itself here. Our research leads us to conclude that no court has attempted to whittle down the constitutional inhibition against a tax by either the federal government or the state without the consent of Congress upon imports and exports. That inhibition is unqualified (discriminatory or otherwise) and prohibits Congress from permitting a state to levy a tax upon an export except for the use and benefit of the United States Treasury.

In this case the contract for the sale of the oil contemplated its export to foreign lands and it was delivered to such lands.

The City urges a distinction without a difference.

The judgment is affirmed.

Wood, *P. J.*, and Lillie, *J.*, concurred.